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No. 619

In the Supreme Court of the United States

OCTOBER TERM, 1958

ARTHUR L. HARRIS, SR., ARTHUR L. HARRIS, JR., ERNEST F. LEA AND CHARLES W. MARSHALL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinions of the Court of Appeals (Pet. App. A; Pet. App. B) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 24, 1958 (Pet. App. C). A petition for rehearing was denied on November 6, 1958 (Pet. App. B). On November 21, 1958, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including January 5, 1959. The petition was filed on January 2, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in view of all the circumstances presented by this record, the court below erred in finding nonprejudicial the failure to permit the defense to examine replies, requested by the defense as to 2 of 29 investor witnesses, to a questionnaire sent by the office of the United States Attorney as part of an investigation of possible fraud in a scheme to sell real-estate lots.

STATEMENT

On January 26, 1955, an indictment was filed in the United States District Court for the Southern District of California, charged petitioners in numerous counts with mail fraud in violation of 18 U.S.C. 1341 and conspiracy to commit that offense (C.T. 2–70).[1] Trial before a jury was commenced on November 2, 1955. On April 6, 1956, the petitioners were found guilty on the conspiracy count; petitioners Harris, Jr. and Lea were found guilty on twenty-two substantive counts, Harris, Sr. on twenty-one, and Marshall on twenty substantive counts[2] (C.T. 249, 251, 253, 255). Harris, Sr. and Harris, Jr. were each sentenced to three years' imprisonment and a fine of $10,000 on the conspiracy count, and three years' imprisonment on each of the substantive counts, to run concurrently with each other and with the imprisonment imposed on the conspiracy count (C.T. 278–279, 284, 287).

[1] We have adopted petitioners' abbreviations, designating the Clerk's Transcript as "C.T." and the Reporter's Transcript as "R.T.".

[2] During the course of the trial, many of the counts of the indictment were abandoned by the government in the interest of brevity.

Lea and Marshall were each sentenced to eighteen months' imprisonment on the conspiracy count and eighteen months on each of the substantive counts, to run concurrently with each other and the sentence imposed on the conspiracy count (C.T. 279–280, 281, 296). The Court of Appeals affirmed.

I

The scheme to defraud charged in the indictment was to induce investors, through false representations, to purchase lots in an area in Kern County, California, known as "Rocket Town" (C.T. 2–8). The property was owned by Trans-Continental Land and Water Company, *Inc.*, a corporation owned by Arthur Harris, Sr. His son, Arthur Harris, Jr., was sole owner of Continental Subdivisions, Inc., a company designated as exclusive sales agent for the sale of lots in the area. Marshall and Lea were sales agents for Continental.

The "Rocket Town" subdivision was approximately 4½ miles from the main gate of the Naval Ordnance Test Station, built in a remote and uninhabited location because of the Navy's need to use the area as a testing station for rockets and other implements of war. Housing accommodations were provided within the Test Station, but by 1948 some additional housing was needed. The commanding officer of the Test Station during the years 1949–1952 testified that there were in the neighborhood of 600 families on the base actually in need of housing (R.T. 1925). This fact was known to the Harrises (Ex. 1 BB).

"Lead on" representations.

Sales of Rocket Town lots were initiated early in 1949 by sending through the mail what is known as

"lead cards", an advertisement attached to a business reply card, which an interested recipient may return to the sender. Over 4½ million of these cards were mailed by Continental from 1950 through 1954 to various persons whose names and addresses were selected from telephone books (R.T. 4435). A typical lead card, some 1,250,000 of which were mailed by Continental in 1951 and 1952, bears on the outside cover the legend "RED HOT NEWS"; inside appears a drawn illustration captioned "ROCKET TOWN" which pictures a road running into the immediate vicinity of the Naval Ordnance Test Station with a notation thereunder "NEW TRANSCONTINENTAL HIGHWAY (UNDER CONSTRUCTION)." The card reads in part: "Rocket Town. Only 2 miles from the fabulous $200,000,000 Naval Ordnance Test Station * * * ." "Thousands of workers are here NOW. They need homes desperately," and again, "The expansion possibilities are unlimited for home, shops, markets and business firms of all kinds * * * " (Ex. 2). Another one of these many lead cards mailed subsequently bears on the outside cover in large type "F.B.I. about NOTS."[3] In small type underneath, F.B.I. is identified as "Free Bonafide Information." Inside the card reads "ROCKET TOWN HAS PASSED 'THE TEST!' There's no doubt about it! This new frontier of opportunity built close to the amazing NOTS has proved successful!" It continues, in part, "Rocket Town is a part of an established community with . . . * Homes * Stores * Markets * Schools * An Airport * Busi.. s

[3] Naval Ordnance Test Station.

Centers * A Community Hospital * Recreational and Entertainment Facilities * Professional Services, all Kinds . . . and more are urgently needed!"; "Here is an assured Money-Making opportunity for Buyers, Sellers and Rentals"; "This is the opportunity of your lifetime! *Newspapers, Life* and *Saturday Evening Post* have told the story to the nation. Results of visionary investors have already necessitated further expansion!"; "THERE'S STILL TIME! Recent expansion of Rocket Town permits our offering you a limited extension of this wise investment opportunity * * * "; "Convinced by the results, interest in Rocket Town increases at a phenomenal pace * * *"; "FIND OUT WHAT $100 WILL DO FOR YOU IN ROCKET TOWN" (Ex. 235–E). Another lead card reads: "A SENSATIONAL, new Southern California subdivision is making *investment-opportunity* history! It's the Transcontinental Land & Water Company's *miracle* development. Here's the rapidly building community nearest to the very gates of the Navy's highly publicized and permanent $200,000,000.00 Naval Ordnance Test Station! Think of the tremendous, ever increasing needs * * *—homes, entertainment, services of all kinds!" (Ex. 235–G).

All of this printed literature had received the approval of either Harris, Sr., or his son (R.T. 4436–4437).

When a recipient of a lead card responded, a company salesman, equipped with a kit, would call upon him. These kits contained price lists, letters, pictures, cartographs, and other printed literature including articles from *Life Magazine* and the *Saturday*

Evening Post which featured the Navy's Test Station and other communities such as Albuquerque and Inyokern.

The investors who purchased lots, after having been visited by salesmen, including petitioners Lea and Marshall (R.T. 540, 2046, 2419, 4089, 4174, 4631, 4743, 5024, 5143), testified to representations made to them. Some testified as to representations made in conversations with the Harrises (R.T. 155, 3008, 4778). At least two salesmen, not indicted, testified in substance that they had made these same representations to the investors upon the instructions of the Harrises and company managers (R.T. 1317–1370, 177–287). One salesman testified that he resigned upon discovering that misrepresentations were continually made after he reported his knowledge of the same to his superiors (R.T. 2338–2366).

Investment opportunities, profits, progress.

The investors testified they were told that the main gate of the Test Station, in reality 4½ miles from the tract office of the subdivision, was or would be moved to within walking distance of Rocket Town (see *e.g.* R.T. 540, 1173). They were told they could double or triple their investment within a year (*e.g.* R.T. 548, 1553, 4093). They were given the opportunity of buying at some $300 less than the price lists they were shown, and were told that the price would go up the following day or week (*e.g.* R.T. 1174, 1798, 3736). They were advised that the opportunity was so good that the salesman himself, who could not own property there, had purchased lots in the name of some member of his family (*e.g.*, R.T. 5026, 5157).

The investors were also told that the Bank of America, J. C. Penney Co., Metropolitan Life Insurance Company, Safeway Stores, Standard Oil Company, and many other concerns had bought lots in the subdivision (*e.g.* R.T. 1616, 1627, 2054). Some were left with the impression that some concerns were ready to begin immediate construction (R.T. 1163). It was stipulated at the trial that none of these concerns had bought lots in Rocket Town (C.T. 195).

Those purchasers who were interested in the property for commercial purposes were given a "protection letter"—a document stating that it was not the intention of the Continental Company to make a further sale in that particular tract for a like business as that contemplated by the purchaser, provided such business was started within one year from the date of the letter (Ex. 341; R.T. 7073–7083). It was conceded at the trial that the letter had no legal effect since nothing would preclude any other purchaser from carrying on any legal business he desired (R.T. 8336).

The investors testified that they were shown the *Life* and other national magazine articles carried by the salesman. Some said they were either told or led to believe that the articles featured Rocket Town when in reality, as noted above (pp. 5–6, *supra*), they dealt with the Test Station and other communities (R.T. 2536–2537, 3741). Some said they were told that buildings were at that time erected in Rocket Town (R.T. 1614, 1806–1809), that there were stores and supermarkets and a school (R.T. 3616–3617).

The only construction on the subdivision at the time of the trial comprised seven houses (R.T. 5662).

In 1954, the Company sent out "Progress Bulletins." These bulletins dealt sparingly with Rocket Town and consisted primarily of news about the Test Station, and the area in general (Exs. 22–199).

Utilities.

The investors testified initially they were given unqualified assurances that all utilities would be available. A public subdivision report of the Division of Real Estate of California, required by law to be furnished to all investors, confirmed that electric power lines were not installed generally throughout the tracts at Rocket Town, but that electricity would be available to some lot owners only upon payment of a deposit as high as $1,400. At least eight of the investors testified that they had not seen the report prior to purchase, but saw it at some time thereafter or at the time of trial (R.T. 4638, 1799–1800, 1034, 4259–4260, 5149–5150, 2530, 2439, 1260).

FHA financing.

Regardless of the year in which these investors had purchased, or the purpose for which they had purchased, their testimony was that they had been assured that financing by the Federal Housing Administration was then, or would be in the near future, available in amounts of from 80% to 100% of the building value. The Government showed by documentary evidence that it was not until September 26, 1950, that the Continental Company made formal application for FHA

approval, at a time when, according to information supplied in the application, a total of 1,500 lots in four tracts had been sold (including those deeded and on contract) (Ex. 80–A). FHA, in a partial commitment asking for additional documentation and pertaining solely to the first four tracts, consented to consider applications for mortgage insurance only on individual properties from bona fide owner-occupants, the amount for each home not to exceed $4,750.00 (Ex. 80–E). It was not until May 13, 1954, that the company furnished the additional exhibits on the first four tracts requested by FHA (Ex. 80–L; R.T. 2237). A few days later the company sought approval on the last three tracts (Ex. 80–I). FHA had written shortly before this time (Ex. 80–J):

> In view of the fact that we issued the original letter of approval more than three years ago and no evidence of activity is manifest, we see no reason for including Tracts 1578, 1593 and 1600 at this time.

A company letter, dated January 16, 1953, and bearing Lea's signature, informed an investor inquiring about FHA building:

> We are in the *throws* [*sic*] of processing same. We should have something definite within a matter of a few days and will let you know the progress.

Company services: financing, building, rental and resale: refunds.

Some of the investors testified that they were told by Lea and others that Continental would also help in financing (R.T. 1618–1619, 4165, 4182, 4374, 4874).

They testified almost without exception to the company's alleged building program supposedly contemplating the immediate construction of 500 homes (see *e.g.*, R.T. 728–729, 1170, 2691, 4097, 4875). Lea told one investor in April, 1954 that 150 homes would be completed within the next two or three days—that the structures had been already leased (R.T. 4195). Marshall told another that a contractor was to build houses to be completed by Christmas, 1952 (R.T. 5149). Harris, Sr. told another, who in November, 1950, asked why there were no improvements or buildings on the subdivision, that the company was getting a loan of eleven million dollars from a New York insurance company within a few days, and that building would start right away (R.T. 4778–4781).

Documentary evidence as to this representation included a company printed form-letter, dated February 18, 1950, reading in part (R.T. 4787; Ex. 285):

> Our building and financing department is ready to proceed now with its improvement program. We have a tremendous amount of inquiries regarding building at Rocket Town.

A company letter dated October 17, 1951, informed an inquiring investor (R.T. 557; Ex. 10):

> * * * we have referred your request to our Building Department, and as soon as they are ready to accept applications for buildings and to take applications for the process of loans, it will be our pleasure to contact you in re same.

A letter dated August 6, 1951, advised:

> * * * we anticipate starting our building campaign very, very shortly.

The investors testified that they had been assured by Marshall, Lea and the Harrises, among others, that Continental would maintain a rental and resale service (see *e.g.* R.T. 549, 2690, 3011, 4163, 4189, 5026, 5051, 5125). Many of these investors, some of whom had not seen their property prior to purchase and who were concerned at the lack of progress or the desolation noticed upon visits (R.T. 818, 1042, 1814, 2060), contacted the company about resales (R.T. 578, 1814, 2444, 2698–2700, 3460–3461, 3627) or refunds which they had been promised (R.T. 821, 1052, 1301, 1632). No refunds were forthcoming. One investor sold his land back to the company at a loss of over $4,000 (R. T. 3471). Other brokers had told him there was no possible chance of selling (R.T. 3510). Another, who attempted to sell her lot back to the company for half of what she paid for it, was dissuaded by a manager who, knowing that she had not seen the property, said he would not want to rob her because the property would be worth three or four times more if she would keep it—that "homes were going up like hot cakes" (R.T. 3624–3626).

Documentary evidence showed that during the years in question the company sent out many letters to its investors saying in substance that it had no resale department at the date of writing but anticipated establishing one at a later date (R.T. 557, 574, 2700, 3768, 7205–7208; *e.g.* Exs. 6, 12, 104, 108, 351, 353). In 1954, one of the letters pointed out that a clause of the contract specified that the seller made no agreement to rent or resell property (Ex. 17). The investors testified that they had not read this clause

which appeared on the back of the contract (*e.g.* R.T. 1052).

The transcontinental highway.

As to a highway, the investors testified that they had been told that a transcontinental highway would definitely run into Rocket Town on Bowman Road. Some said they were told by Lea, Marshall, and others that the highway was already under construction (R.T. 5147, 5142–5143). Documentary evidence furnished the investors, and produced at the trial, showed maps representing the route of the highway. In addition to the illustration on the lead cards mentioned above (pp. 3–5, *supra*), picturing the highways as "Under Construction," many maps and cartographs pictured the highway coming straight through Rocket Town as a "Possible" or "Proposed" "New Transcontinental Highway" (see *e.g.* Exs. 153, 190, R.T. 218-220).

The government showed through documentary evidence that in August, 1948 the State Highway Commission wrote petitioners' promotional agency that "the ultimate location of the road through this desert area has not yet been determined" (Ex. 22–51). (The California legislature had in 1947 enacted a measure bringing Route 212 into the state.)

In December, 1951, the Division of Highways wrote Continental (Ex. 163):

> * * * nothing definite can be stated. It appears very likely that a survey will be started this winter and it likewise appears very likely that the proposed route will be in close proximity of the Bowman Road.

In January, 1952, the Division wrote Harris, Sr. of a proposal to develop Bowman Road, in time, into a freeway; if it materialized it would appreciably diminish the depth of lots north and south of the road (Exs. L–1, 164). The subdivision had not made allowance for any freeway (Ex. 23).

In March, 1952, the Highway Commission wrote Transcontinental (Exs. 166, 22–58) that it could not assure that the highway would follow Bowman Road, "Consequently nothing should be done toward securing this right of way until you are advised further." Two months later, Transcontinental was advised of a pessimistic outlook concerning funds to finance any project; no assurance was given that the highway would be built then or at any definite time in the future (Ex. 167).

Hundreds of thousands of lead cards were sent out after this time, including those, as noted above, p. 4, *supra*, picturing a transcontinental highway "Under Construction."

Other letters of the Commission in 1953 and 1954 made it clear that the problem of finances made the construction of any highway speculative. At the time of trial, the highway had not been constructed.

II

The seventeenth investor witness was a Mrs. Craggs, who had purchased one lot from a salesman named Hamilton and two other lots after talking with Lea (R.T. 2156 ff.). During her testimony, the government introduced a memorandum from Continental's files which was a report of a call upon the

witness and her husband in April, 1954. It read in part (R.T. 4212):

> Mr. Craggs was somewhat upset because of a letter from a Mr. blank of postal department.

At the outset of his cross-examination, counsel for the Harrises asked for "all communications sent by this witness" to government counsel, "including the response to the questionnaire that you sent to her, which she testified to" (R.T. 4219). Government counsel said the witness had furnished nothing but material in the confidential files, which were the government's work papers, and defense counsel said he would develop that on cross-examination (R.T. 4219).

On cross-examination, the witness was then asked what conversation she had had with the salesmen (Hamilton and petitioner Lea) before certain clippings concerning a cross-country highway were left with her. When she said she could not remember the details, the defense counsel said (R.T. 4299):

> Well, now, isn't it a fact that this is what happened: That you told these gentlemen that you had been informed by the Post Office Department that there was no such thing as a cross-country highway, and they then said "Why, that isn't true."

When the witness denied this, counsel asked whether the salesman had left the clippings, "without regard to any conversation with reference to the Post Office Inspector or Mr. Kinnison or the Department or the U.S. Attorney having written you some letters." The witness said she told the salesman she had received a questionnaire from the United States

Attorney's office (R.T. 4300). She subsequently said she told the agents she had filled in the questionnaire (R.T. 4305, 4319). Later, on cross-examination by counsel for Lea and Marshall, she testified that she had read over her answers to the questionnaire, before testifying (R.T. 4459). Counsel asked for production of the questionnaire which was refused (R.T. 4461–4462).

Thereafter, another investor witness testified, and was not examined concerning the questionnaire (R.T. 4500–4545). As to the next such witness, it was brought out on cross-examination that she had filled in the questionnaire in 1954, and had read it about a week before she testified (R.T. 4613–4614). No request for production was made. The next witness could not remember receiving a letter from the United States Attorney but stated that he and his wife had filled in the questionnaire (R.T. 4698–4699). When a request for production was made, the United States Attorney stated that the document was a work paper and the court agreed that this legal objection was valid (R.T. 4698–4701). The witness testified that he had not seen the questionnaire since he completed it in February, 1954 (R.T. 4701). Three other investor witnesses testified without examination as to the questionnaire (R.T. 4732–4772, 4772–4829, 4830–4869). Then the witness Bejarno testified on cross-examination that he tried to resell his lots to the company because, after inspection, he did not like them, but that he was told to wait six months (R.T. 4925–4928). Subsequently he made a deal with Harris by which he obtained a deed to one lot and cancelled the contract

on another (R.T. 4933–4935). He said he told Mr. Harris that he heard the government was investigating and he wanted to get his money (R.T. 4935, 4942). Counsel for Harris then offered in evidence the blank form-letter and questionnaire sent out by the United States Attorney's office in February, 1954 (R.T. 4943-4951).[4] The witness said that after he received the questionnaire he talked with Mr. Kinnison and then went to Mr. Harris (R.T. 4952). No questions were asked as to whether the witness had signed the questionnaire, and no demand for production was made. After another group of investors had testified, one was asked on cross-examination whether she had filled in the questionnaire and she said she had (R.T. 5219). No further questions were asked and no request for production was made.

ARGUMENT

This case was tried before the decision of this Court in *Jencks* v. *United States*, 353 U.S. 657, and of course before the enactment of 18 U.S.C. 3500. Under both the decision and the statute, we think that production of the replies to the questionnaire, when requested, would be required. While the two replies to the questionnaire requested by the defense were not contemporaneous with the events to which they referred, they were made by the witnesses about two years before the trial, related to the testimony of the witnesses at the trial, and in one instance had been used by the witness before trial to refresh her recollection. For

[4] This is set forth in Appendix E to the petition for a writ of certiorari.

these reasons, we feel that the replies to the questionnaire were statements within the purview of 18 U.S.C. 3500.

The sole question which this case presents, therefore, is whether, under the particular circumstances of this particular trial, the error in failing to accede to the request for the production of the replies, with respect to the 2 out of 29 investor witnesses as to whom such a request was made, was so prejudicial as to warrant reversal of a clearly merited conviction resulting from a trial of over five months. It is the government's position that—in the light of the whole record, and of the gross fraud amply proved by documentary evidence of the company's literature and public records, as well as by the testimony of former salesmen for the company, and of all the other investor witnesses whose replies to the questionnaire were not sought—the court below properly held that the error was harmless and did not justify reversal of the conviction.

This case is not, as petitioner argues, like those in which this Court has already granted certiorari. Each of those cases, in some form or other, presents a question as to what constitutes a statement within the purview of 18 U.S.C. 3500, and attacks the validity of the statute in limiting production to statements signed or adopted by the witness.[5] It is true that in some of

[5] Nos. 489 (*Pittsburgh Plate Glass Co* v. *United States*, 358 U.S. 917) and 491 (*Galax Mirror Co., Inc.* v. *United States*, 358 U.S. 918) involve grand jury minutes; Nos. 435–437 (*Lev* v. *United States*, *Wool* v. *United States*, and *Rubin* v. *United States*, 358 U.S. 903) and No. 471 (*P[illegible]* v. *United States*, 358 U.S.

those cases the government has argued and will argue that non-production, even if erroneous, was not prejudicial, but the initial question in those cases is whether production was required at all. Here, the government, as already noted, admits that both the decision in *Jencks* and the statute cover the replies which were not produced. The sole issue is the significance of the conceded error to this case as a whole.

By its very nature, harmless error is a problem which must be resolved on the particular facts of each particular case and cannot be said to be contrary to or in conflict with a decision on other facts in other cases. As this Court said in *Kotteakos* v. *United States*, 328 U.S. 750, 761, the discrimination required in deciding whether an error is technical or substantial "is one of judgment transcending confinement by formula or precise rule." And further, at p. 762, "In the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of *stare decisis* by what has been done in similar situations. * * * Necessarily the character of the proceeding, what is at stake upon its outcome, and the relation of the error asserted to casting the balance for decision on the case as a whole, are material factors in judgment."

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905) involve an investigator's report of a conversation with the witness; No. 451 (*Rosenberg* v. *United States*, 358 U.S. 904) involves a letter written by the witness which did not relate to the facts to which the witness testified. In No. 488 (*Scales* v. *United States*, 358 U.S. 917), the challenge is to the fact that irrelevant material was excised before the statement was turned over.

We attempt no "color matching" with other cases. We think that—unless it can be said that never, under any circumstances, may the failure to produce as to any witness, no matter how inconsequential, be deemed non-prejudicial (and the lower courts have held otherwise*)—the court below properly found that there was no prejudicial error in this case. The brief summary of the 9,000-page transcript which we have given in the Statement, *supra,* shows that this case was one of gross fraud, all the more reprehensible because it was cleverly disguised with evasions and half-truths. The trial court, in sentencing the defendants, said that he found that the "utmost of bad faith" had been proved, but that he was taking into consideration the fact that none of the defendants was young (R.T. 9191–9192). This fraud was proved, not only by the testimony of the investor witnesses, but by literature emanating from the petitioners' companies, by documentary evidence, and by the testimony of some former salesmen.

Moreover, we think that the record makes it abundantly clear that the defense was not much interested

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United States v. *Sheba Bracelets*, 248 F. 2d 134 (C.A. 2), certiorari denied, 355 U.S. 904; *Simms* v. *United States*, 248 F. 2d 626, 629–630 (C.A. D.C.), certiorari denied *sub nom. Duncan* v. *United States*, 355 U.S. 875; *Padron* v. *United States*, 254 F. 2d 574, 576 (C.A. 5), certiorari denied, 358 U.S. 815.

The *per curiam* opinion in *Indiviglio* v. *United States*, 357 U.S. 574, does not represent a holding that an error of this kind can never be harmless. The conviction there concededly had to be reversed on grounds unrelated to production of documents. The citation of *Jencks* in the *per curiam* reversal represents, we believe, the Court's disapproval of the opinion below.

in the replies to the questionnaire. Sixteen investor witnesses testified for the government before the questionnaire was mentioned by defense counsel. This cannot be attributed to lack of knowledge on the part of the defense. As appears from the Statement, *supra*, Mrs. Craggs testified that she told salesmen Lea and Hamilton about the questionnaire shortly after filling it in; another testified that, after receiving it, he went down and told Harris that he wanted his money back because the government was investigating the sales. Indeed, defense counsel asked for a reply to the questionnaire before there had been any direct testimony as to the questionnaire (see the Statement, *supra*, p. 14), and defense counsel had a blank form of the questionnaire which he read into evidence (*supra*, p. 16). Even after the issue of the questionnaire had been opened up, defense counsel did not pursue the matter. They allowed one witness to testify without asking any questions about the questionnaire, made no request for production as to the next, and then asked for production only as to the one other witness. In answer to the argument made for petitioners in the court below—*i.e.*, that the pattern had been set and that counsel could not pursue the attempt without prejudice to their clients—it should be noted that they showed no such reluctance as to other objections. Although they stated they had a running objection to testimony by salesmen not indicted (see *e.g.* R.T. 2522–2523, 3607–3608) and although they had made abundantly clear their position that company documents were not, as

such, admissible against the defendants, they constantly reiterated such objections during testimony by later investor witnesses (*e.g.* R.T. 4199, 4211–4212, 4215–4216, 4216–4217, 4502, 4582, 4649). And, above all, even if the testimony of all other investor witnesses after Mrs. Craggs be disregarded, the evidence against petitioners remains overwhelming.

The real issue in this case was, not whether the representations were made, but the good faith of petitioners. The Harrises in particular tried to show that the company literature was justified, and also attempted to disclaim responsibility for the acts of the salesmen (R.T. 5535 ff.). Each of the petitioners took the stand and testified at length in support of his position. In the face of this and of the very strong proof that the government adduced, as contrasted with the insignificance of the failure to produce the two replies, we submit that the finding of harmless error by the court below was fully justified. There is no occasion for this Court to undertake another review of this lengthy record.[7]

[7] Petitioners have suggested that this Court grant certiorari and hear the case at the same time it considers the others referred to in fn. 6, *supra*. As discussed, *supra*, p. 17, we do not think this case presents issues in common with those cases. And since it is our position that the only real issue in this case is harmless error which must be determined on the whole record, the government would, if the Court decided to hear the case, be required to undertake a more extensive and detailed review of the 9,200-page transcript than has been possible at this stage. This would, of course, necessarily take substantial time.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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